

IN THE MISSOURI SUPREME COURT

Case No. 084372

STATE EX REL. CINDY KERTZ,

Relator,

v.

THE HONORABLE MARGARET M. NEILL,

Respondent.

**On Petition For Writ Of Mandamus
Directed To
Honorable Margaret M. Neill
Circuit Judge, Missouri Circuit Court
Twenty-Second Judicial Circuit**

BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

This action in mandamus is one involving the question of whether Respondent failed to enforce a clear, unequivocal, preexisting, and specific right of Relator when Respondent granted a motion for transfer of venue. This Court has jurisdiction pursuant to Article V, §4.1 of the Missouri Constitution to consider application for and issue remedial writs.

Relator states that it sought a writ of mandamus in a lower appellate court, and on February 21, 2002, the Missouri Court of Appeals, Eastern District, denied Relator's application (A-7).

STATEMENT OF FACTS

The facts forming the basis of this petition for a writ are not disputed.

The issue here is venue. Dale V. Kertz was killed at a railroad crossing in Perry County, Missouri, on October 9, 2000. (A-1, Petition, at ¶7). His widow, on behalf of herself and Caleb Kertz, Dale's son born shortly after his death, filed suit in the Circuit Court of the City of St. Louis. At the time suit was filed on September 12, 2001, the only defendant named was Burlington Northern Santa Fe Railway Company (hereafter "BNSF"). Plaintiff alleged venue was proper under §508.040.¹ BNSF had tracks running into and through the City of St. Louis. (A-1, at ¶4). On September 13, 2001, plaintiff obtained leave to amend the petition and add defendant Mark Probst, who resides in Scott County, Missouri (A-2, First Amended Petition and Order, Judge Joan M. Burger, dated September 13, 2001, at ¶1).

On October 23, 2001, this Court issued its opinion in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo banc 2001). There, the Court held that venue is determined at the time the challenge is submitted, not – as *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo banc 1994) had held – at the time the suit was filed. The *Linthicum* court distinguished *Mummert* by stating that in the prior case, the plaintiff had dismissed parties after filing suit while in *Linthicum* the plaintiff added parties. *Linthicum*, 57 S.W.3d at 858.

In the court below, the defendants moved for transfer from the City to the County of St. Louis. (A-3, Defendants' Motions to Transfer Venue). The railroad argued that the applicable venue statute was

¹ All references to statutory references are to RSMo 2000 unless otherwise noted.

§508.010, by which “residence” of the parties is the determinative factor. The railroad maintained that because its registered agent is in St. Louis County, it must be considered a “resident” of that county for all purposes – including venue. (A-3, ¶6).

Plaintiff’s argument against transfer was two-fold. First, the correct venue provision was not §508.010 at all; rather, under *Mummert*, at the time suit was brought there was only a corporate railroad defendant and §508.040 would control. Second, even if §508.010 applied, BNSF is a resident of St. Louis City, regardless of where its registered agent has its office. (A-5, Kertz Suggestions in Opposition to Defendants’ Motions to Transfer for Improper Venue, p.7).

After hearing argument, the Honorable Respondent transferred the case to St. Louis County. (A-6, Order, Hon. Margaret M. Neill, dated December 18, 2001, p.5). Plaintiff sought a writ of mandamus from the Missouri Court of Appeals, Eastern District, which was denied on February 21, 2002. (A-7, Order, Hon. Robert G. Dowd, Jr., Eastern District Cause No. ED80721).

Because Respondent had a ministerial duty to deny the motions to transfer and Relator has a present, indisputable right to mandamus, Relator asks this Court to make peremptory its Alternative Writ of Mandamus.

POINTS RELIED ON

- I. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE VENUE WAS PROPER UNDER §508.040 AT THE TIME SUIT WAS FILED; VENUE SHOULD HAVE BEEN DETERMINED BASED ON THE PARTY IN THE CASE AT THE TIME SUIT WAS FILED, AND THIS COURT'S DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO BANC 2001) SHOULD BE OVERRULED.**

Section 508.040, RSMo 2000

State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820

(Mo banc 1994)

II. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE IF §508.010 APPLIED AS RESPONDENT HELD, DEFENDANT BURLINGTON NORTHERN SANTA FE IS A RESIDENT OF THE CITY OF ST. LOUIS, MAKING VENUE APPROPRIATE UNDER §508.010(2), RSMO.

Section 508.010 RSMo 2000

State ex rel. Stamm v. Mayfield, 340 S.W.2d 631 (Mo banc 1960)

State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo banc 1998)

ARGUMENT

I. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE VENUE WAS PROPER UNDER §508.040 AT THE TIME SUIT WAS FILED; VENUE SHOULD HAVE BEEN DETERMINED BASED ON THE PARTY IN THE CASE AT THE TIME SUIT WAS FILED, AND THIS COURT’S DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO BANC 2001) SHOULD BE OVERRULED.

A. Standard For Issuance Of Writ Of Mandamus.

Mandamus should issue to enforce a clear, unequivocal, specific right. *State ex rel. Missouri Growth Ass’n. v. State Tax Comm.*, 998 S.W.2d 786, 788 (Mo banc 1999). The purpose of the writ is to execute, not adjudicate. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo banc 1996). Ministerial acts of the lower courts may be compelled by mandamus. *State ex rel. Lane v. Kirkpatrick*, 485 S.W.2d 62, 64 (Mo. 1972).

B. Mummert Should Control This Case; *Linthicum* Should Be Overruled.

This Court should overrule a decision rendered just a few months ago, *State ex rel. Linthicum v. Calvin*, because its holding is not supported by the plain language of the venue statutes. Further, it is unworkable in practice, and makes venue an ever-changing, never resolved issue.

The propriety of venue is determined by statute. *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo banc 1993). “The legislature’s language is specific, definite, and certain in its provision for a

plaintiff's determination of proper venue for his suit." *Willman v. McMillen*, 779 S.W.2d 583, 585 (Mo banc 1989). When only corporations are sued, §508.040 applies. This provides:

Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

When individuals are joined with corporations, this Court has held that the applicable venue provision is §508.010, which provides in pertinent part:

Suits instituted by summons shall, except as otherwise provided by law, be brought . . .

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides.

§508.010(2)-(3).

Residence is not defined in the venue statutes, but as to domestic corporations this Court has held that the location of the corporation's registered office is the corporation's residence for all purposes, including venue. *Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273, 274-75 (Mo banc 1984).

This “all purposes” construction stems from §351.375.2, which provides in part: “The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.”

In *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo banc 1994) this Court ruled that venue should be determined as of the time the suit was “brought,” i.e., originally filed, rather than at the time the motion to transfer venue is ruled. *Id.* at 823. The plaintiff had originally sued both individuals and corporations, making §508.010 applicable, but before the hearing on the venue motion plaintiff had dismissed the individual defendant. Plaintiff argued, therefore, that §508.040 decided the case, and venue was proper in the City of St. Louis where the corporate defendants had offices. *Id.* at 821. This Court rejected plaintiff’s contention, holding that when “suit was brought, none of the defendants resided in the City of St. Louis.” *Id.* at 823.

Judge Limbaugh, dissenting, pointed out the inequity of such a rule:

In the absence of a controlling statute, the better rule, in my view, is that the propriety of venue and the “ministerial duty to transfer the case” should be determined according to the presence and status of the parties at the time the court rules on the merits of the challenge. This rule affords plaintiffs the opportunity to dismiss the party defendant whose presence in the suit gives rise to improper venue and allows the case to proceed expeditiously. It avoids the awkward procedure that ultimately allows plaintiff to bring the suit in the City of St. Louis, but only if it is first

dismissed and then refiled without joinder of the party defendant in question. *Mummert*, 870 S.W.2d at 823 (Limbaugh, dissenting.)

Thereafter, this Court approved and clarified *Mummert* in *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901 (Mo banc 1996), in holding that when venue is challenged based on defective pleadings (as opposed to residence of defendants) the court should consider the state of the pleadings at the time the challenge is decided. *Id.* at 903.

This Court and the courts of appeals continued to apply the bright-line rule of *Mummert* until *Linthicum* was decided. In *State ex rel. Brinker Resource, Recycling and Reclamation, Inc. v. Dierker*, 955 S.W.2d 931, 933 (Mo banc 1997), this Court held that, under §508.070.1, venue is determined as the case stands when brought. In *State ex rel. Palmer by Palmer v. Goeke*, 8 S.W.3d 193, 195 (Mo App E.D. 1999), the court held that the original filing of the case determined venue, even though the defendant had changed residence after the case was filed.

In *Threats v. General Motors Corp.*, 890 S.W.2d 327, 329 (Mo App E.D. 1994), the Court followed *Mummert* and ruled that venue was proper when the case was brought, even though a co-defendant had been dismissed by the trial court before the venue motion was decided. In *State ex rel. Santoya v. Edwards*, 879 S.W.2d 775 (Mo App E.D. 1994), the plaintiff sued a number of defendants, including a school district, which is treated as a municipal corporation. Municipal corporations, under §508.070, RSMo, may be sued only in the county where the municipal corporation is situated. Before the venue hearing, the plaintiff had dismissed a number of defendants, including the school district. *State ex rel. Santoya*, 879 S.W.2d at 776.

The *Santoya* court, relying on this Court's *Mummert* decision, held that the dismissal of the school district was irrelevant. Venue had to be determined as of the time the case was brought, and since the school district was an original defendant venue was only proper in the county where it was situated. *Id.* at 776-777.

The cases of *State ex rel. Simms v. Sanders*, 886 S.W.2d 718, 719 n.1 (Mo App E.D. 1994), and *Belton Wrecking & Salvage Co.*, 983 S.W.2d 541, 547 (Mo App E.D. 1998), also echoed this Court's words in *Mummert* that venue is determined as the case stands when brought.

Thus, at the time the instant case was filed the law of venue seemed quite clear. If residence of parties defendant determined venue, the originally filed petition would control. Then along came *Linthicum*, in which this Court declared that venue may be determined several times, as each new defendant is brought into the case. This Court should overturn *Linthicum*, as the rule it announces will lead to numerous venue challenges throughout the state.

If each defendant is allowed to challenge venue with each amendment of the petition, plaintiffs' attorneys in this State will be faced with the Hobson's choice of selecting the appropriate venue for their clients' cases, on the one hand, and suing other, potentially more culpable or solvent defendants on the other. Suppose in this case that BNSF was the only defendant in this case for two years, and the case remained in St. Louis City.² Suppose that within a few months of trial, BNSF obtained leave to amend its answer to assert that its employee-engineer was acting outside the scope of his employment at the time of the accident. Suppose further that the statute of limitations was about to run as to the engineer. Clearly the

² An unlikely hypothetical, since BNSF would remove the case to federal court.

trial court would grant leave to plaintiff to join the engineer individually, but consider the cost to the plaintiff.

He can name the engineer and lose his trial setting and his preferred venue. Or, he can go to trial in the original venue, lose based on no employer liability, and lose his right to sue the individual.

This cannot be what the legislature intended in enacting venue statutes, nor what this Court desires in its implementation of court rules. Numerous other fact scenarios are set forth in the dissenting opinions in *Linthicum*, and Relator submits that each is entirely plausible. In the words of Judge White, the *Linthicum* holding “eliminates the bright-line rule concerning venue and offers in replacement a never-ending and unpredictable tide leaving the parties only to guess as to which courthouse door they ultimately will be washed ashore.” *Linthicum*, 57 S.W.3d at 871. The *Linthicum* case should be overruled.

II. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE IF §508.010 APPLIED AS RESPONDENT HELD, DEFENDANT BURLINGTON NORTHERN SANTA FE IS A RESIDENT OF THE CITY OF ST. LOUIS, MAKING VENUE APPROPRIATE UNDER §508.010(2).

A. Standard For Issuance Of Writ Of Mandamus.

As stated previously, mandamus should issue to enforce a clear, unequivocal, specific right. *State ex rel. Missouri Growth Ass’n.*, 998 S.W.2d at 788. The purpose of the writ is to execute, not adjudicate. *State ex rel. Breckenridge*, 920 S.W.2d at 902. Ministerial acts of the lower courts may be compelled by mandamus. *State ex rel. Lane*, 485 S.W.2d at 64.

B. BNSF Resides In The City Of St. Louis.

If §508.040 controls venue in this case, Respondent's order unquestionably was wrong. Respondent held that §508.010(2) applied, making venue proper where any defendant resides. Relator submits, however, that even if §508.010 applies in this case, still the case should not have been transferred. The reason, simply put, is that for foreign corporations like BNSF, their residence is anywhere they have offices or agents for the transaction of their business.

The issue before the Court is this: Is the residence of a foreign corporation solely where it maintains its registered agent? Relator submits it is not. Rather, foreign corporations, like insurance companies, should have their residence determined by the common law rule. Under this rule, a corporation's residence is where it has offices or agents for the transaction of its usual and customary business. *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 193 (Mo banc 1998).

In her suggestions in support filed in this Court, at 7-9, Relator set forth §351.375 and §351.588 side by side. The suggestions are attached to the appendix at A-8. Section 351.375 is titled "Change of address of registered office or agent, how made," and takes up a full page. Section 351.588, titled "Change of registered office or agent of foreign corporation," takes up about one-half page. Section 351.375 states in part: "The location of residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained." No similar wording appears anywhere in the parallel foreign corporation provision, §358.588. In fact, the very definition of domestic corporation, at the beginning of Chapter 351, excludes foreign corporations:

(6) “Corporation” or “domestic corporation” includes corporations organized under this chapter or subject to some or all of the provisions of this chapter except a foreign corporation. (§351.015(6)).

As to domestic corporations, Missouri courts no longer followed the common law rule after 1943, when the General Assembly declared the residence of a corporation “for all purposes” as the county where its registered office is maintained. Sec. 351.375(3), codifying 1943 Mo. Laws 420, sec. 10 (now, §351.375.5). This provision only appears in the chapter of the Missouri Statutes covering domestic corporations. For domestic corporations, this provision operates, under present law, as determinative of corporate residence under §508.010(2). *See Dick Proctor Imports*, 671 S.W.2d at 274.³

Attempts to apply §351.375.2 to foreign corporations simply don’t work unless the section is somehow incorporated by reference. Here, Respondent applied the all purposes language by resort to two statutory sections. First, she stated that “the definitions set forth in §351.015 RSMo apply to the chapter, including those provisions regarding foreign corporations, ‘unless the context otherwise requires.’” (A-6, at p.4).

³ The wisdom of this approach, and in particular Judge Wolff’s suggestion in *State ex rel. Smith v. Gray* that the “all purposes” section merely adds another place of residence – not the exclusive residence – is discussed *infra*.

Here, the context does otherwise require. The all purposes language appears in §351.375, which defines the procedure for a domestic corporation to change the address of its registered office or agent. The procedure for a foreign corporation to change its registered office or agent is set forth in §351.588 – a statute bearing no “all purposes” language whatsoever. If we are going to take one sentence out of §351.375 and put it into §351.588 by judicial fiat, why shouldn’t the two statutes be identical? Respondent’s justification for this statutory grafting assumes the legislature had no idea what it was doing.

The legislature frequently and properly treats foreign corporations differently from domestic corporations. For example, §351.586, “Registered Office and Agent of Foreign Corporation,” is quite different from its domestic counterpart, §351.370, “Registered Office and Registered Agent.” The former provides that each foreign corporation authorized to transact business in Missouri maintain a registered office “that may be the same as any of its places of business.” Section 351.370 states that each corporation shall maintain a “registered office which may be, but need not be, the same as its place of business.” A foreign corporation is authorized specifically to have another foreign corporation serve as its registered agent, §351.586.2(c), while domestic corporations do not have such a right enumerated.

Similarly, resignations of registered agents of foreign corporations become effective on “the thirty-first day after the date on which the statement [of resignation] was filed” by the Secretary of State, §351.592.3, while resignations of domestic registered agents “become effective upon the expiration of thirty days after receipt of such notice [of resignation] by the Secretary of State, §351.376. These differences may be subtle, and they may be minor. The point is that courts are not free to disregard plain language of statutes, nor are they at liberty to insert words or phrases for the sake of expediency or fairness.

The second justification Respondent employed to find BNSF exclusively a resident of St. Louis County is also invalid. Respondent relied on §351.582.2, which provides:

A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this chapter, is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

There is no doubt that foreign corporations can designate their registered office and registered agent by following statutory procedures, no less than domestic corporations can. Registered agents of both foreign and domestic corporations may resign, again, by following the statutory procedures. The mistake Respondent makes in this case is assuming that depriving foreign corporations of the “all purposes” language somehow takes away a “right” or “privilege” of the foreign corporation. The legislature merely determined that when a domestic corporation designates its registered office and agent it has the effect of establishing the corporation’s residence. A foreign corporation has the same right or privilege to designate its registered office, but the effect of such decision is not the same.

And how can any serious argument be made that this is unique in the Missouri Statutes? The venue statutes themselves treat “residents” and “nonresidents” of the state differently. Nonresidents of the state may be sued in any county in the state, while residents can only be sued where they (or a co-defendant) reside or where the cause of action accrues, §508.010. Corporations, including foreign corporations, may be sued in any county where corporate offices or agents are located, §508.040. Railroads, foreign and

domestic, have one of the broadest venue provisions on the books, §508.040, which provides that they may be sued in any county into which the railroad tracks run.

Thus, any suggestion that it is unfair to deny the “all purposes” language to foreign corporations rings hollow. Worse, the focus of venue analysis has shifted well to the side of corporate “rights” regarding venue. Not only has the legislature decreed that corporate venue should be extremely broad, but this Court has observed that “[i]t may not make any difference” to a foreign corporation in what county the plaintiff may file his action. *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343, 350 (Mo banc 1962). The case below is an example of the absurdity of catering to the railroad defendant’s venue needs. Burlington Northern Santa Fe may be sued in any county in the state where it has tracks or offices when it is the only defendant, as it was initially in this case. Assuming *Linthicum* remains the law, adding defendant Probst, a Missouri resident, changes the venue-determinative issue to residence.

Probst is a resident of Scott County, Missouri (A-2), the county seat of which is Benton, Missouri. Benton is 130 miles from the 22nd Judicial Circuit Court in the City, and 138 miles from the 21st Judicial Circuit Court in Clayton.⁴ Respondent transferred the case to St. Louis County, BNSF’s purported residence.

So now, defendant Probst is happy?

C. The Evolution Of Foreign Corporate Residence.

⁴ Obtained from www.smartpages.com, an online service of Southwestern Bell Yellow Pages.

Respondent's Order is the result of a long history of conflicting opinions of this Court. Relator submits that the plain language of the Missouri Statutes decides this case, and makes BNSF a resident of the City. Resolving the issue now is more important than where the Court has been, but a brief history frames the context of Respondent's Order.

The earliest case on point from this Court is *State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo banc 1939). In *Henning*, the court was asked to decide where Shell Petroleum Company, a foreign corporation, resided for purposes of venue. *Id.* at 562. Shell was a defendant along with an individual who resided in St. Charles County. *Id.* The court framed the issue in the case as follows:

So the question is whether a foreign corporation licensed to do business in this state and having an office and place of business in some county is a resident of that county for the purposes of service under clause (2) of Sec.

720.⁵ *Henning*, 131 S.W.2d at 562.

The *Henning* court first determined that the term “residence” in the venue statute under scrutiny was properly applied to corporations. *Id.* at 563. After examining prior cases, the court held as follows:

⁵ This is now §508.010(2).

But all these decisions and the statutes cited show that a licensed foreign corporation must have one or more residences in the state where it is open to service. If that is so; and if under Sec. 723,⁶ *supra*, when foreign or domestic corporations are sued alone, the venue of actions against them is in “any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business,” we can see no reason why their residences should not be regarded as established in the same way when, perchance, they are joined as defendants with another, thereby fixing the venue under Sec. 720.

Id. at 565. Accordingly, suit was allowed to proceed against Shell in the City of St. Louis, where it had offices and agents transacting its business. *Id.*

In 1943, as stated previously, the General Assembly amended the laws relating to corporations to require that corporations designate registered agents, and provided that a domestic corporation’s residence for “all purposes” was the county in which it maintained its registered office. In *State ex rel. O’Keefe v. Brown*, 235 S.W.2d 304 (Mo banc 1951), the court determined that the new §351.375.3 did not merely add to the possible residences of a domestic corporation for venue purposes, but defined the exclusive residence of a corporation for purposes of §508.010(2): “The legal residence of [the defendant

⁶ Now, §508.040.

corporation] is fixed by the location of its registered agent, registered office and principal office”
O’Keefe, 235 S.W.2d at 306.

In *State ex rel. Whiteman v. James*, 265 S.W.2d 298 (Mo banc 1954), the court ruled Jackson County venue improper where a Jackson County plaintiff brought an action against an individual Andrew County resident and Continental Baking Company, a foreign corporation with an office in Jackson County but a registered agent in the City of St. Louis. The court cited *O’Keefe* and, while failing to cite or acknowledge §351.015(6), noted that the “only difference between that case (*O’Keefe*) and this is that there the corporation was a domestic corporation and service upon it was undertaken under another statute. These circumstances are without significance, and so do not justify any other or different construction of the statutes.” *Whiteman*, 265 S.W.2d at 300. The court held that venue was proper only in the City of St. Louis, where Continental Baking had its registered agent. *Id.*

Judge Hyde dissented, concluding that the general “all purposes” provision of §351.375 should not control the specific venue mandate of §§508.010 and 508.040 – statutes specifically intended to direct venue. *Whiteman*, 265 S.W.2d at 301 (Hyde, J., dissenting). He stated: “I think the most reasonable construction is that it only adds another office (the registered office) to those where service can be made for and venue established.” *Id.*

Then came this Court’s decision in *State ex rel. Stamm v. Mayfield*, 340 S.W.2d 631 (Mo banc 1960). *Stamm* involved a suit in the City of St. Louis against a foreign insurance corporation that maintained an office in the City of St. Louis. Under insurance statutes, the insurance company had designated the commissioner of insurance in Cole County to receive service. A second defendant, a sales

agent of the insurance company and a St. Louis County resident, was served in St. Louis County. The defendants moved to quash service on the basis of *Whiteman*.

Stamm rejected *Whiteman* as binding precedent for two reasons. First, §351.690, RSMo 1949 expressly exempted insurance companies from the provisions of Chapter 351. Second, and most important for the analysis in this case, the court stated:

Section 351.375 applies to foreign corporations only to the extent that §351.625 incorporates it by reference, and the last sentence of §351.375 which was the basis of the *James* decision is not properly includable in the reference. Section 351.625 which contains the reference to §351.375 reads as follows:

“A foreign corporation may from time to time change the address of its registered office. A foreign corporation shall change its registered agent if the office of registered agent shall become vacant for any reason, or if its registered agent becomes disqualified or incapacitated to act, or if it revokes the appointment of its registered agent. Any such change either in the registered office or in the registered agent shall be made *in the manner* as prescribed in Section 351.375.” *Stamm*, 340 S.W.2d at 633-34. (emphasis in original)

Stamm expressly ruled:

To the extent that it holds that the last sentence of §351.375 is applicable to foreign corporations, *State ex rel. Whiteman v. James* is

disapproved. . . . Since *State ex rel. O'Keefe v. Brown* involved a domestic corporation, no case is presented for a re-examination of the construction placed upon the phrase 'for all purposes' appearing in the last sentence.

Stamm, 340 S.W.2d at 634. *Stamm* thus stands for the proposition that the all purposes language does not apply to foreign corporations.

Two years after *Stamm* was decided, this Court reversed course. In *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo banc 1962), the court held that there was no jurisdiction in Jackson County (venue at that time was jurisdictional), where plaintiff brought suit in that circuit for injuries occurring in Franklin County against an individual resident of Franklin County and D-X Sunray Oil Company, a Delaware corporation. *Id.* at 344. Defendant D-X maintained an office for the conduct of its usual and customary business in Jackson County but its registered agent was in the City of St. Louis. Deeming defendant D-X to "reside" in the county where it maintained its registered agent but not where it actually did business, the court held venue improper in Jackson County. *Id.* at 351. Without overruling *Stamm*, *Bowden* determined that *Stamm* was limited to its facts. In fact, the court relegated *Stamm*'s discussion of the all purposes language vis-a-vis foreign corporations to "mere *obiter*."⁷

⁷ *Stamm* ruled venue proper on two independent grounds, first that the defendant was an insurance company, to which the provisions of chapter 351 did not apply and second, because the all purposes language of §351.375 did not apply to foreign corporations. *Stamm*, 340 S.W.2d at 634. "Obiter" is defined as "by the way; incidentally; in passing." BLACK'S LAW DICTIONARY 1072 (6th Ed. 1990). "*Obiter dictum*" is defined as "words of an opinion entirely unnecessary for the decision

of the case.” *Id.* When a court provides two reasons for the same decision, each of which is dispositive, is either basis really *obiter dictum*?

Dissenting in *Bowden*, Judge Storckman asserted that the majority incorrectly construed and applied §351.375, as had the court in the prior *O’Keefe* and *Whiteman* opinions. At best, Judge Storckman contended, venue remained only one of *several* purposes intended by the “all purposes” language contained in §351.375. *Id.* at 353 (Storckman, J., dissenting). Suggesting that “all” modifies “purposes,” Judge Storckman maintained that service of summons, taxation, and attachment joined venue as other purposes advanced by the language which, he contended, fell far short of precluding any other location or residence for the purpose of venue. *Id.* Judge Storckman concluded:

that the legislative intent was to make sure that another place of venue and service was designated or continued as it was under the prior law; it was not the legislative intent to destroy the effectiveness of Clause 2 of §508.010 as it had been interpreted and construed in the *Henning* case.

Id. at 354.

The court in *Bowden*, although ultimately holding that a foreign corporation resided where its registered agent was located, made clear its decision was very narrow. The defendant foreign corporation in *Bowden* did not object to venue in Jackson County even though its registered agent was in the City of St. Louis. Because of this, held the *Bowden* court, “only the rights of the individual defendant are involved in this case.” 359 S.W.2d at 349 (emphasis in original). Going on, the court stated that while it may be critical to an individual defendant that he know the corporate defendant’s residence, the reverse wasn’t necessarily true:

It may not make any difference to such a foreign corporation in what county the plaintiff may file his action, but, on the other hand, it may be

vitaly important to the particular individual defendant the plaintiff seeks to join as an additional defendant in the action. (*Id.* at 350.)

In sum, *Henning* and *Whiteman* support Relator's contention herein that the all purposes language does not apply to foreign corporations. The Court should overrule *Bowden* as it is not supportable under the plain language of the statutes.

D. An Easy Solution: Read The Corporate Statutes And Venue Statutes
In Pari Materia.

For reasons known only to the legislature, foreign business corporations – like insurance companies – are treated differently in the statutes. The legislature chose in 1943 to confer a residence “for all purposes” on domestic corporations. This was done in §351.375. The almost identical twin to §351.375 for foreign corporations is §351.588. Nowhere in this latter section is the all purposes language used. Respondent's Order, however, provides a residence to foreign corporations which the legislature declined to offer.

This Court can decide this case on the clear and unequivocal grounds that the all purposes language of §351.375.2 does not apply to foreign corporations, which remain subject to the common law test expressed in §508.040. Or, the Court may resolve this case and, undoubtedly, numerous others heading the Court's way, by reading the corporation and venue statutes in *pari materia* and declaring that the “all purposes” merely adds another place of residence to the existing common law residence of corporations.

In *State ex rel. Smith v. Gray*, 979 S.W.2d at 193, this Court ruled that an insurance company properly was considered a resident of any county where it had agents for its business:

The General Assembly's amendment for general and business corporations did not alter the common law for corporations not covered by the amendment

By changing the law for general and business corporations but not for insurance companies, the legislature left intact this Court's definition of "residence" for insurance corporations. Under Sections 508.010(2) and 508.040, foreign and domestic insurance corporations "reside" for venue purposes in any county where they have or usually keep an office or agent for the transaction of their usual and customary business.

Like insurance companies, foreign corporations have no statute defining their residence "for all purposes." Thus, BNSF and all other foreign corporations must look to the common law for the definition of their residence. What they will find, as reflected in §508.040, is that they reside wherever they have offices or agents for the transaction of their usual and customary business.

Judge Wolff concurred specially in *State ex rel. Smith v. Gray*, suggesting that the corporation statutes and venue statutes should be read as consistent with each other. He recommended an approach that would comport with legislative intent, be easily understood and readily applied:

Where a corporation is statutorily a resident "for all purposes" of a county where it maintains its registered office, the statute does not make that county the exclusive residence of a corporation. The statute, consistent with the venue statute, simply creates another venue choice – not the exclusive venue residence

. . . .

Thus, the most logical way to reconcile the venue statutes and the business corporation statute is to hold that a business corporation for venue purposes is a resident of a county where it maintains an office for the transaction of its usual business (section 508.040) *and* a resident of a county where it maintains its registered office (section 351.375). . . . *Id.* at 195-96 (Wolff, J., concurring) (emphasis in original).

State ex rel. Smith v. Gray did not represent the first time a member of this Court has questioned the wisdom of *State ex rel. Whiteman v. James*. In *Sperry Corp. v. Corcoran*, 657 S.W.2d 619 (Mo banc 1983), the court disallowed a suit in the City of St. Louis where all the corporate defendants had their offices in Greene County and the individual defendants resided there, and the only connection to St. Louis City was the registered agent of one of the corporations. The holding was based on improper joinder of claims,⁸ but Judge Blackmar in dissent pointed out the awkwardness created by the *Whiteman* case:

I would be willing to consider a modification or rejection of the holding of
State ex rel. Whiteman v. James, 265 S.W.2d 298 (Mo. banc 1954),

⁸ *Sperry Corporation* was overruled in *State ex rel. Biting v. Adolf*, 704 S.W.2d 671, 672 (Mo banc 1986).

which observes that under §351.375, RSMo 1978 the registered office constitutes the residence of the corporation for all purposes. This holding leads to the anomalous situation in which a corporation may not be sued in the county in which its registered office is located if it is the sole defendant, unless it transacts some portion of its business in that county, *State ex rel. Whaley v. Gaertner*, 605 S.W.2d 506 (Mo.App.1980), construing §508.040, RSMo 1978; but may be sued there, along with the individuals, if there are properly joined individual defendants residing in other counties.

Sperry Corp., 657 S.W.2d at 624-25.

Adopting the approach suggested by Judge Wolff accomplishes several goals. First, it eliminates the facade of foreign defendants “designating” their residence in the most defendant friendly counties, even though virtually all of the defendant’s operations and business may be carried out in a different county. Second, as Judge Wolff points out, it would eliminate “the strategic choice of joining an individual defendant for venue purposes where, ordinarily, a plaintiff would not otherwise be inclined to do so.” *State ex rel. Smith v. Gray*, 979 S.W.2d at 196. (Wolff, J., concurring).

Third, such an approach allows the venue statutes and the corporation statutes to be read in *pari materia*. So, §351.375.2 could establish a county as a corporation’s residence, but this fact alone would not determine venue in all cases. In *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo banc 1991), this Court essentially looked to §508.040 (venue when only corporations are sued is any

county wherein defendant has an office or agent) to determine corporate residence under §508.010, which applies when corporations are joined with individuals.

Fourth, and specifically regarding the case *sub judice*, finding BNSF to be a resident where it has offices, agents, and tracks would be faithful to the railroad venue statute itself. The legislature revised §508.040, RSMo most recently in 1929, and for all this time has believed that a railroad should be subject to a very broad venue provision:

[I]n case the corporation is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then [the case may be brought] in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

It makes no sense to allow railroad corporations to dictate venue by the simple procedure of changing their registered agents.

A parallel for §351.375.2 may be found in §226.100, which provides that the principal office of the State Highway Commission “shall be in the City of Jefferson, Missouri.” In *State ex rel. Govero v. Kehm*, 850 S.W.2d 100 (Mo banc 1993), this Court had to decide whether this was an exclusive venue fixing provision. Overruling the case of *State ex rel. State Highway Comm’n. of Missouri v. Bates*, 296 S.W.2d 418 (Mo banc 1927), the *Govero* court held that “[t]here is nothing in the language of Section 226.100 indicating that the intent of the legislature was to limit venue in all cases filed against the Commission to Cole County.” *State ex rel. Govero*, 950 S.W.2d at 102.

This Court held very recently that the non-profit corporation statute⁹ was an exclusive venue fixing act, but only because the statute provided that a suit against a non-profit corporation “shall be commenced only in one of the following locations” §355.176.4 RSMo. *State ex rel. SSM Health Care of St. Louis v. Neill*, ___ S.W.3d ___, No. SC84092, Mo banc, June 25, 2002. (emphasis added).

Section 351.375.2 is much more akin to §226.100 than to §355.176.4. The “all purposes” language says nothing about venue and the corresponding venue statutes say nothing about exclusivity. If either §508.010 or §508.040 used the words “shall be filed” in combination with “only in” a certain county, this Court would hold that venue was mandatory in such county. Reading §351.375.2, §508.010, and §508.040 in *pari materia*, giving meaning to each and every word, one cannot possibly conclude that venue against a corporation is proper only where that corporation places its registered agent.

⁹ Section 355.176.4, RSMo 1994 was repealed by the legislature in 1996, but this Court held the repeal unconstitutional in *St. Louis Health Care Network v. State*, 968 S.W.2d 145, 149 (Mo banc 1998). Thus, the venue fixing provision still applies when nonprofit corporations are sued.

CONCLUSION

In summary, Respondent's Order in this case is clearly wrong because the railroad defendant is a resident of St. Louis City under the traditional test. BNSF has no right to declare its residence as St. Louis County only, and nothing in the Missouri Statutes supports the county as the railroad's exclusive home.

Moreover, when this case was originally filed venue was proper in St. Louis City. This Court should reconsider its decision in *Linthicum*, and adhere instead to the bright-line rule of *Mummert*.

Finally, the Court should bring logic and reason to the law of corporate venue, and adopt Judge Wolff's theory that corporate venue is proper both where the statutory corporate residence is located, and where such corporation carries out its business.

The Alternative Writ of Mandamus should be made absolute.

Respectfully submitted,

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I hereby certify that two copies of Relator's Brief and a disk with a copy of Relator's Brief was mailed this ____ day of _____, 2002, by depositing same in the U.S. Mail, first class, postage prepaid, and addressed as follows:

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RULE NO. 84.06(B) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this Brief contains 7811 words according to the word count of Corel Word Perfect Version 9.

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I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

PATRICK J. HAGERTY

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